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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 694

UNITED STATES EX REL. BORUCH TRAININ, FOR AND ON BEHALF OF ISAAC TRAININ, PETITIONER

v.

COLONEL DAVID E. CAIN, COMMANDING OFFICER, CAMP UPTON, NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 180–190) is reported at 144 F. (2d) 944. The opinion of the district court appears at R. 149–155.

JURISDICTION

The judgment of the circuit court of appeals was entered September 12, 1944 (R. 206), after a petition for rehearing had been denied (R. 205). The petition for a writ of certiorari was filed

November 20, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940 and of the Selective Service Regulations are set forth in the Appendix, *infra*, pp. 26–30.

QUESTIONS PRESENTED

1. Whether there was substantial basis for the action of the Selective Service appeal board in denying petitioner classification as a minister of religion and in classifying him as available for military service.

2. Whether the appeal board improperly considered the recommendation of a panel of experts, established by the Selective Service System, which interrogated petitioner to determine whether he was a bona fide minister of religion within the meaning of the Act and the Selective Service Regulations.

3. Whether a registrant possessing a certificate of ordination as a minister of religion who does not customarily perform the duties of a minister is exempt from military service under Section 5 (d) of the Selective Training and Service Act of 1940.

STATEMENT

Having been classified I–A (available for military service), petitioner was, on March 11, 1944, ordered by his local board to report for induction on March 22, 1944 (R. 20). He reported, and on the same day his father instituted the present habeas corpus action on his behalf. The petition for the writ (R. 3–5) alleged, in substance, that petitioner [1] was a minister of religion and that the local board's refusal so to classify him was based on an erroneous construction of the Selective Training and Service Act of 1940, and on an arbitrary and unreasonable finding of fact. The petition was supported by an affidavit (R. 6–9) executed by petitioner which recited his version of the events which culminated in his induction, as well as by other exhibits (R. 9–12). The writ issued (R. 2) and a return (R. 13) was made by respondent, which alleged that petitioner was lawfully selected for military service and inducted under the provisions of the Selective Training and Service Act of 1940. Petitioner formally traversed the return (R. 14) and a hearing was had. The evidence adduced at the hearing may be summarized as follows:

Petitioner was born in Russia in 1919 and migrated to this country in 1929 (R. 118). He

[1] As did the court below, we shall refer to the registrant, Isaac N. Trainin, as "petitioner."

registered with local selective service board No. 200 in Brooklyn on October 16, 1940 (R. 15). His questionnaire was mailed to him on June 24, 1941, and it was returned completed on July 7, 1941 (R. 15). In his questionnaire he stated that he was a minister of religion customarily serving in that capacity; that he was ordained on June 1, 1938, by "Chief Rabbi of Newark at Brooklyn, N. Y.;" that he was not a student preparing for the ministry in a theological school; and that he had been a minister of the Jewish faith since January 1, 1939 (R. 159).[2] At the same time petitioner submitted to his local board an ordination certificate executed by Rabbi Jacob Mendelson (R. 161) and one executed by Rabbi Alexander Levine (R. 163). Both were written on letterheads and were in Hebrew. They were executed in June 1940 and while they purported to be certificates of ordination they differed from the usual certificate in that they did not contain the words "Yoreh-Yoreh" or "Yodin-Yodin," which are customarily used to authorize an or-

[2] In November 1942, petitioner likewise filed with his local board an occupational questionnaire in which he stated that the title of his present "job" was "Rabbi"; that he began this work in March 1937, and that the length of his experience in this type of work had been five years and eight months. In describing the duties of his "job" petitioner stated, "I am the spiritual leader of my congregation and principal of the religious school"; that he was employed by the Tifereth Zion Anshe Sfard synagogue; and that the "job" for which he was best fitted was that of being a rabbi (R. 160).

dained rabbi to act in specified religious matters (R. 98, 101).[3]

Since petitioner claimed exemption as a rabbi, the local board requested one Rabbi Leiter to investigate his status as a rabbi (R. 16). Rabbi Leiter advised the board that he believed petitioner to have been properly ordained (R. 38).[4] On the basis of this information the local board on October 16, 1941, classified petitioner IV–D (minister of religion) (R. 16, 27).

In the spring of 1942 the local board received several anonymous messages to the effect that petitioner had never attended a rabbinical school, that he had obtained his ordination certificates by fraud, that he was not qualified to be a rabbi, and that it was his father, not petitioner, who was the rabbi for the synagogue with which petitioner claimed he was associated

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[3] Petitioner's selective service file also contained a communication from the Hebrew Orthodox Rabbis of America and Canada stating that petitioner was a member of that organization, and a communication from the Federation of Orthodox Rabbis of America to the effect that petitioner was a duly ordained rabbi and was the rabbi of the Congregation of the Tifereth Zion Anshe Sfard synagogue of Brooklyn, New York (R. 36–37).

[4] Rabbi Leiter also advised the board to verify petitioner's status by inquiring at the city's marriage license bureau to determine whether petitioner was recognized as a minister of religion. The board made such inquiry and was informed that petitioner had not sought recognition from the bureau as a rabbi; a second inquiry on or about October 10, 1941, revealed that in the interim petitioner had been registered as a rabbi (R. 16, 27, 39).

(R. 16–17). The board continued petitioner's classification after interviewing a witness for petitioner (R. 65–66).

Thereafter, on June 3, 1943,[5] the events which culminated in petitioner's ultimate reclassification to I–A commenced. On that date the local board received a letter from the committee on character and fitness of the Supreme Court of New York, accompanied by a consent from petitioner, requesting permission to examine petitioner's selective service file in connection with his application for admission to practice law. The board granted the request. (R. 17.) On June 30, 1943, the New York City Selective Service Headquarters requested petitioner's file "for the purpose of review" (R. 17). Up to this point, petitioner had not informed the local board "that he was completing his course in law" or "serving as a clerk in a law office" (R. 20; see *infra,* p. 12).

City Headquarters assigned an investigator to petitioner's case and on November 17, 1943, he submitted his report to headquarters (R. 168–172).[6] Without detailing the findings of the report, it is sufficient to note here that it cast serious doubt upon the bona fides of petitioner's

[5] The date June 3, 1942, appearing in the printed record (R. 17) is obviously an error. The context shows that the correct date was June 3, 1943.

[6] This report is characterized in the petition (p. 41) as the "Emanuel Report."

claim that he was a rabbi. In the meantime petitioner had been requested by the City Selective Service Headquarters to attend a hearing on November 17, 1943, in respect of his classification as a minister of religion. He appeared on that date and, in accordance with the usual practice in New York City in such matters, he voluntarily submitted to interrogation by a panel of experts established to render advisory opinions on technical religious matters. The panel that examined petitioner consisted of Dr. Alexander M. Dushkin, Executive Director of the Jewish Educational Committee of New York, Rabbi Herbert S. Goldstein, Rabbi of the West Side Institutional Center; Judge Jonah J. Goldstein of the New York Court of General Sessions; Rabbi Israel H. Leventhal of the Brooklyn Jewish Center; and Judge Samuel Null of the Supreme Court of New York (R. 57).[7]

When petitioner appeared before the theological panel, the panel had before it his selective service file, and on the basis of the materials contained in it the panel closely examined petitioner concerning the bona fides of his claim that he was a minister of religion customarily serving as such. On the basis of that examination and with full knowledge of the materials contained in petitioner's selective service file, the panel recom-

[7] The details concerning the organization of this panel are set forth at R. 53–58 and are discussed at pp. 19–22, *infra*.

mended by unanimous vote that petitioner not be classified as a minister of religion [8] (R. 58). In a statement dated November 17, 1943, the panel stated (R. 164):

> Upon a review of the file in this case, and examination of the registrant, the members of the panel are convinced beyond a doubt that registrant has never duly functioned as a rabbi, and in any event is not qualified, either by training or character, to function as a rabbi. The certifications he has presented are not in the traditional rabbinic form.
>
> Moreover, the responses made by the registrant to questions asked of him clearly indicate an attempt to pile up pretext upon pretext, and evasion upon evasion, for the purpose of concealing the fact that he is not qualified as a rabbi and is not functioning as a rabbi in a bona fide manner.[9]

On November 23, 1943, petitioner voluntarily appeared at City Headquarters, accompanied by a relative, "to request further administrative re-

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[8] An explanation of the technical religious matters which were involved in the panel's interrogation of petitioner and the reasons for the panel's conclusion are set forth in the testimony of Rabbi Goldstein (R. 96–112).

[9] While the recommendation of the panel and a transcript of the interrogation of petitioner was forwarded without delay to the local board and placed in petitioner's selective service file, the panel's statement of the reasons for its recommendation was not forwarded to the board until March 18, 1944 (*infra*, p. 11). The statement was considered by the board in its final review of petitioner's classification on March 20, 1944 (*infra*, p. 11).

view of the case."[10] A memorandum (R. 173–175) of that interview was prepared and was forwarded to the local board at a later date (see *infra*, p. 11). On November 24, 1943, City Headquarters notified the local board of the panel's recommendation and forwarded to the board a transcript of petitioner's testimony at the hearing before the panel (R. 17–18, 30–31). On December 9 1943, the local board reclassified petitioner I–A by unanimous vote (R. 18). Petitioner requested a hearing before the local board and on December 27, 1943, petitioner appeared before the board accompanied by his father, his brother-in-law and three other rabbis (R. 18, 73). Petitioner testified in the present proceeding that Mr. Goldman, a board member, told him at that hearing that "he wanted to be impartial and hear our side of the story; and said he would read the entire testimony taken before the Panel" (R. 73). Thereafter the local board prepared a memorandum in which it stated that "after full consideration of the registrant's file and a statement made by registrant to the rabbinical panel, we believe that the classification of I–A is just and fair" (R. 18–19). At petitioner's request, the local board arranged an appointment for petitioner with the government appeal agent (R. 19), who,

[10] At this interview with Mr. Agress of City Headquarters, petitioner submitted a third certificate of ordination. This one purported to have been executed by petitioner's father on June 17, 1939. (R. 85–86.)

after interviewing petitioner, extended the time in which he could appeal and prepared two memoranda in respect of petitioner's status and his contentions (R. 19).

On January 10, 1944, petitioner took an appeal to the board of appeal (R. 19). Thereafter his file was forwarded to the appeal board and petitioner filed two unidentified letters and two exhibits with that board (R. 19). On February 16, 1944, the appeal board, "giving consideration to the relator's entire file," unanimously classified petitioner I–A (R. 20, 60–61). Thereafter, on March 1, 1944, petitioner wrote to National Headquarters of the Selective Service System, apparently seeking further administrative review, despite the fact that his right to appeal under the Selective Service Regulations had already been exhausted. That letter was forwarded to New York City Selective Service Headquarters and on March 18, 1944, that office advised petitioner that his case "had been subjected to careful investigation by our advisory panel of theological classifications, and upon all the information on record they are of the opinion that [petitioner] was properly classified by Local Board and by the Appeal Board and that no further administrative action is warranted in the matter." (R. 21.) In the meantime, on March 11, 1944, the local board issued its order directing petitioner to report for induction on March 22 (R. 20–21). On March 18 petitioner's letter to National Head-

quarters, accompanied by the November 17, 1943, statement of the theological panel (*supra*, p. 8), the November 17, 1943, report of City Headquarters' investigation, and the memorandum of petitioner's interview at City Headquarters on November 23, 1943, was forwarded to the local board for its consideration (R. 21). Despite the fact that petitioner had already been ordered to report for induction, the local board on March 21, 1944, reviewed these additional materials and after such review it "declined to take any further action in the matter" (R. 179).

The transcript of petitioner's testimony at the hearing before the theological panel (R. 125–140), which was received in evidence at the trial with the remainder of petitioner's Selective Service file (R. 15–24), shows that petitioner testified that he believed he was entitled to exemption from military service because he was an ordained rabbi and was "presently functioning as a Rabbi" (R. 126); that he was ordained in April, 1940 (R. 127); that in 1941 he sought to enter the Army as a chaplain, but that he was rejected by the Jewish Welfare Board, the duly constituted agency for passing on such matters, "because I had not functioned as a Rabbi" (R. 126); and that he was married and lived in the home of his parents (R. 128). In respect of his rabbinical education, petitioner testified that he had had no formal training or education in any religious seminary and that his religious training consisted of daily lessons from

his father and of one weekly lesson from Rabbi Mendelson during the years 1935–1937 (R. 129). During the period when he was being trained for the rabbinate, petitioner was also pursuing a secular education. He testified both before the theological panel and at the trial below that he graduated from high school in 1938; that he attended college from 1938 to 1940; that he entered St. John's law school in 1940, graduating in 1943; and that upon his graduation he took the New York State bar examinations and thereafter worked as a law clerk for a New York attorney. (R. 91–93; 129–134.) It was petitioner's claim at the hearing before the theological panel that he began functioning as a rabbi in 1939 when he was nineteen years old and was a freshman in college (R. 130). He testified that beginning in 1939 he delivered sermons in the synagogue for which his father was the rabbi; that he participated in the services at the unveiling of tombstones; and that in 1940, after he was ordained, he also performed weddings, but he could recall only the name of one member of the congregation for whom he had performed a marriage ceremony (R. 130–132).[11]

[11] Rabbi Goldstein, a member of the theological panel, testified that the panel considered petitioner's testimony concerning these activities, but that these activities did not establish conclusively that petitioner was a rabbi, because "unfortunately there are many people who do that, who are not ordained Rabbis. Every cantor in this city does it without being an ordained Rabbi. A cantor also performs wedding ceremonies and goes to funerals and unveilings, and it is not a particular function of the ministry." (R. 107.)

In answering broad general questions relating to basic religious matters and writings, petitioner was evasive and in respect of many questions he stood mute (R. 138–140).

The synagogue with which petitioner claimed to be associated was organized in 1937; petitioner's father was its first rabbi (R. 121). He testified at the trial that in 1939 he relinquished his position to petitioner and from that time on his function was to "take care of the building," "officiate at the services" and "read the scroll at services;" and that his son "preaches and performs Rabbinic duties" and is the principal of the synagogue's religious school, the teaching staff of which was composed of petitioner and his younger brother (R. 121, 133).

On the basis of this evidence the trial court entered findings of fact and conclusions of law adverse to petitioner's contentions (R. 140–146). The court found as a matter of law "that the [petitioner] was afforded full and fair hearings before the Local Board, Appeal Board and Panel on Theological Classifications; that said agencies acted in accordance with law and did not abuse the discretion reposed in them by the statutes applicable thereto; nor were said agencies arbitrary, capricious or unreasonable" (R. 145). On appeal the circuit court of appeals affirmed the judgment of the district court (R. 206).

ARGUMENT

1. Petitioner's principal contention (Pet. 10, 11–12, 17–21, 25–38) appears to be that the decision of the circuit court of appeals raises an important question in respect of the scope of judicial review of Selective Service classifications in habeas corpus, which that court decided wrongly. As the court below pointed out (R. 187) there has been no authoritative ruling by this Court on this question. It is our view, in accordance with that expressed in *Ex parte Stanziale,* 138 F. (2d) 312 (C. C. A. 3), certiorari denied *sub nom. Stanziale* v. *Paullin,* 320 U. S. 797, that judicial review of habeas corpus is limited to consideration of whether the registrant was afforded his procedural rights and a fair hearing, in the sense that the evidence which he offered was considered by the boards. We believe, however, that it is unnecessary in this case to resolve that important question. Even applying the substantial evidence rule for which petitioner contends (Pet. 17–21), it is plain that petitioner's classification is not vulnerable. Nevertheless, if the Court should desire to examine the question of the scope of judicial review on habeas corpus in this case, we do not, of course, oppose the granting of the writ for that purpose.

Since petitioner was finally classified by his appeal board (*supra,* p. 10), the propriety of his classification must be tested in the light of the evidence which was before that board. See *Bowles* v. *United States,* 319 U. S. 33; *Falbo* v.

United States, 320 U. S. 549, 555. The only evidence in the record concerning the appeal board's consideration of petitioner's case is the testimony of the chairman of the appeal board *supra,* p. 10, that the board gave consideration to petitioner's entire selective service file in reaching its unanimous conclusion that petitioner was not entitled to be classified IV–D as a minister of religion. Accordingly, it is clear that the only question which petitioner's contention presents is whether there is substantial evidence in petitioner's selective service file to support the appeal board's determination that petitioner was not entitled to exemption from military service as a minister of religion.[12] That there is such support for the appeal board's determination is, in our view, not open to serious question.

Selective Service Regulation 622.44 (a) (2) and (c) required the board of appeal to classify petitioner IV–D if it found that petitioner was a duly ordained minister of religion—"a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who

[12] We assume for the purpose of this argument that, as petitioner urges, the court may set aside a selective service classification and order an inductee discharged if the classification finds no substantial support in the registrant's selective service file.

customarily performs those duties." The court below found that there was sound basis for disbelieving petitioner's claim that he was duly ordained and that there was "ample justification" for the board's finding that petitioner did not customarily perform the duties of a rabbi (R. 188–189).

On the basis of the facts reflected by petitioner's selective service file when the board of appeal considered it, it is clear that a real issue of credibility existed. If petitioner's evidence was accepted as credible there was ample basis for finding that petitioner had been duly ordained, and while his evidence concerning his functioning as a rabbi was weaker, it was probably adequate to support a finding that he customarily performed the duties of a rabbi. But it is evident from the classification it gave petitioner that the appeal board disbelieved the evidence upon which petitioner relied.

Aside from the issue of credibility, we submit that the board of appeal's classification of petitioner is firmly supported by the evidence contained in petitioner's selective service file. The file showed that petitioner had been interrogated by a panel consisting of prominent Jewish laymen and clergymen who, it is not open to doubt, were eminently qualified to render an advisory opinion on the technical and complex questions raised by petitioner's claim to ministerial status. Petitioner voluntarily appeared before them and

consented to interrogation concerning his claim to exemption. That interrogation showed that petitioner's certificates of ordination were not in the customary form; that petitioner had had no formal religious education; that he claimed to have been a regularly functioning rabbi during the period when he was still obtaining his secular education; that he was pursuing a course of action calculated to lead to his practicing law; that the religious functions which he claimed to perform were functions which are also performed by persons other than rabbis; that petitioner was unable to enter the army as a chaplain because the Jewish Welfare Board had found that he was not a regular practicing rabbi; and, most important, that petitioner lacked the basic training necessary to enable him to perform the functions of a rabbi. As we have shown (*supra,* p. 8), the theological panel unanimously recommended that petitioner was not entitled to exemption as a minister of religion. This advisory recommendation, when viewed in the light of the transcript of the panel's interrogation of petitioner and of the special competence of the panel to deal with this subject matter, furnished substantial basis for the action of the appeal board. Furthermore, petitioner's classification was informally reviewed again by his local board as a result of petitioner's letter to National Selective Service Headquarters (*supra,* p. 11). At that time the local board had additional evidence which had not been in the file when the

appeal board reviewed it, including the panel's memorandum (*supra,* p. 8), and it found after reviewing the entire file again that petitioner was properly classified.[13] In these circumstances, both the local board and the appeal board having concurred in petitioner's classification and both the trial court and the circuit court of appeals having found no basis for invalidating that classification, we submit that there is no occasion for further review by this Court on the question of the sufficiency of the evidence to sustain the Selective Service Agencies. Cf. *Ex parte Stanziale,* 138 F. (2d) 312, certiorari denied *sub. nom. Stanziale* v. *Paullin,* 320 U. S. 797.

2. Petitioner further contends that the Selective Service boards "improperly abdicated" their functions to the theological panel and permitted it to "determine the basic issue" (Pet. 38–39).

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[13] Petitioner urges (Pet. 40–43) that the trial court erred in receiving in evidence the materials which the local board received after petitioner was classified I–A by the appeal board. His argument is that under Section 626.2 of the Selective Service Regulations, *infra,* p. 28, the local board lacked power to reopen his classification (Pet. 2, 12, 43) since the additional proof furnished no basis for reclassifying him. We submit, however, that the local board was entitled to review the petitioner's Selective Service file together with the additional materials which it received after petitioner was classified, to determine whether there was any occasion for reopening his classification. The board having done so, the materials which it considered were relevant to the issue whether petitioner had been arbitrarily classified by the Selective Service System.

Since under the Selective Training and Service Act, the Selective Service System is authorized to avail itself of voluntary services to aid it in the administration of the Act (*infra,* p. 26) and since the theological panel acted only in an advisory capacity (*infra,* p. 21), it is plain that petitioner's contention is wholly without merit.

The testimony of Colonel Durham, Chief of the Legal Division of the New York City Headquarters, at the trial, plainly reveals the legal basis and the practical necessity for the establishment of the theological panel (R. 54–56):

> The Selective Service regulations provide that the administration of the Selective Service Law shall be under the supervision of a national director, called the Director, and that in each state the Governor shall be the responsibility for administering the law. Furthermore, that the Governor may delegate his authority to a State Director, and in the case of New York City, there is a special provision which has created New York City as a separate, well, we might say a 49th state, with the same authority and powers as the state organizations, so that the New York City Director, who is Colonel McDermott, has all of the authority and all of the responsibility and the powers that a State Director has, and under that authority there is delegated to him all the authority that the Governor has for the administration of the Selective Service law. It is under

that authority that we organized this Panel about a year and a half ago.

The COURT: What is this Panel, Colonel?

The WITNESS: We found that in respect to theological classifications, the Local Boards were not equipped to handle the necessary investigations, nor did they have the special knowledge that was required to determine many of these difficult theological questions. In the early days that was not much of a problem, because the classifications were all made on the basis of the information in the questionnaire, and in Series 8 of every questionnaire there are three or four questions, and one of them is: "Are you a theological or Divinity student preparing for the ministry, and if so, of what institution, or are you a regular minister of religion and are you an ordained minister of religion, and if so, when were you ordained?"

Those were the simple questions, and that is all the information that the Boards had.

Well, as I say, in the early days when there were plenty of registrants, it was not a problem. The Boards could classify on the basis of that information. In the latter part of 1942 we began to review—the Local Boards began to review those classifications and others, and more and more they came to headquarters to help them with problems. Those all came to me as one of the headaches of the Legal Division. And we had several conferences about it, and

> finally decided that the sensible thing to do was to get together a group of men who might be considered experts, just as we use them in the medical field and in the occupational field and in the case of conscientious objectors. We have hearing officers who have the authority to hold hearings and question the registrant and find out and make a report and recommendation. So we did the same thing in the theological field. And we now have two such—we call it a panel—but they are divided into sections. We have the Panel before whom this registrant came and was questioned. We have another panel that deals more with the cases of Protestants, the various denominations of what might be called the Protestant group; and we have in process of organization a third group, which will have to deal with the Catholic situation, although that is simpler than either of the others, because in the Catholic Church everything is so highly organized, you can pretty well put your finger on the answers.

Colonel Durham further testified that each member of the theological panel signed an oath of office and a waiver of pay, as required by the Selective Service Regulations (*infra,* p. 27) (R. 57–58), and that the panel "renders an advisory opinion which may or may not be followed" (R. 57).

It is undisputed in this case that the conclusion of the panel which interrogated petitioner and

the transcript of that examination were placed in petitioner's selective service file, and that both were considered by the board of appeal in finally classifying petitioner I–A, and by the local board in its informal review of petitioner's classification thereafter. There is likewise no question that both boards were fully aware of the advisory nature of the panel's recommendation. In these circumstances the advice of the panel is in the same category as the recommendation of Rabbi Leiter (*supra*, p. 5), upon which petitioner relies (Pet. 3, 27, 29). Rather than prejudicing petitioner, the use of experts to aid the boards in determining the technical religious question whether petitioner was a duly ordained practicing rabbi insured to him an imartial determination by persons of his own religious faith, who were eminently qualified to pass on the question presented by his claim to exemption as a minister of religion. In short, the theological panel performed the same function that an expert witness performs in the trial of any law suit and which petitioner's expert witnesses performed in this case (see Pet. 8, 29–30).

3. Finally, petitioner contends (Pet. 23–24) that he was entitled to exemption from military service as an ordained minister of religion, even though he does not customarily perform the duties of a rabbi. As we shall show, the Selective Service Regulations expressly provide to the contrary,

and they are consistent with the congressional purpose underlying Section 5 (d) of the Act, which provides:

> Regular or duly ordained ministers of religion * * * shall be exempt from training and service (but not from registration) under this Act.

In accordance with this provision, Selective Service Regulation 622.44 (*infra*, p. 27) provides that a regular minister of religion or a duly ordained minister of religion shall be classified IV–D, the classification which petitioner sought. The regulation further provides, however, that "a duly ordained minister of religion is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; *and who customarily performs those duties.*" [Italics supplied.]

It is petitioner's view that there is no support in the Act for the requirement of the regulation that to be entitled to an exemption a duly ordained minister must also be a practicing minister. We submit, to the contrary, that in Section 5 (d) the Congress intended to adhere to the same exemption from military service which was provided in the first World War. Thus, the pertinent language of Section 5 (d) is identical to

that in Section 4 of the Selective Draft Act of 1917 (50 U. S. C., App. 204). And, likewise, the 1917 Selective Service Regulations provided in Section 79 (*infra*, p. 29) that a duly ordained minister within the meaning of the Act was one who not only was ordained as such but who practiced as a minister of religion. Resort to the discussions on the floor of the Senate of the amendment which became Section 5 (d) of the Act, shows beyond any doubt that it was intended that the exemption granted by the 1917 Act and regulations should be granted by the 1940 Act (86 Cong. Rec. 10500–10503). Thus, in explaining the present provision, Senator Walsh stated on the floor of the Senate (86 Cong. Rec. 10502):

> * * * So far as I am concerned and so far as the representatives of religion who have conferred with me are concerned, we are very strongly of the opinion that the amendment should have no loopholes in it, and that only ministers of the gospel and actual students who are engaged in giving all their time in preparation for religious work should be exempted.
>
> The regulations of the War Department which were promulgated in 1917 were in every way satisfactory to these religious groups; and I think the Senator from Colorado, in drafting his amendment, had in mind the language that was used in the law of 1917 and had in mind the expecta-

> tions that the War Department would promulgate the same regulations if the pending bill should be enacted.
>
> As I understand, there was in the committee unanimity of opinion in favor of exempting actual ministers of the gospel who are actually performing ministerial and religious duties.

Thus, we submit that Selective Service Regulation 626.44 is a valid interpretation of the congressional intent that, as in 1917, only ministers of religion who actually function as such should be exempted from military service. The Congress, it is clear, did not intend that a mere ordination certificate should of itself entitle a registrant to exemption from military service. We agree with the court below (R. 189) that Section 5 (d) is "more a recognition of the public need for spiritual guidance than a mere individual privilege."

Respectfully submitted.

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DECEMBER 1944.